SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

RUTH CHASE DONALDSON, FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

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Appellees.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

This is an appeal from the judgment of the Supreme Court of Minnesota, entered herein on February 23, 1944, affirming the judgment of a District Court.

I

Opinions Below

The opinion of the Supreme Court of Minnesota, upon which was entered the judgment from which this appeal is taken, is reported in 216 Minn. 269, 13 N.W. (2d) 1 (R. 401-409).

The opinions of the same court, which were rendered on January 10, 1941, in the same case and in the related case of *Pomeroy* v. *National City Company*, and which are directly involved on this appeal, are reported as follows: *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518 (R. 362), and *Pomeroy* v. *National City Company*, 209 Minn. 155, 296 N. W. 513 (R. 353-362).

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended, and, also, in the alternative, under Section 237 (c) thereof, as a petition for certiorari, if the case be not the proper subject of a petition for appeal under Section 237 (a). The judgment, from which the appeal is taken, is a final one in the highest court of that state (R. 475). It drew in question the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The petition for appeal was presented on April 22, 1944 (R. 475). This Court noted probable jurisdiction on October 9, 1944 (R. 487).

The specific grounds upon which the jurisdiction of this Court is invoked are given in appellant's Jurisdictional Statement, previously filed herein pursuant to Rule 12 of the Rules of this Court, and in appellant's brief in answer to appellees' statement opposing jurisdiction, previously filed herein pursuant to Rule 7. Reference is hereby made to each of these documents.

III

The Minnesota Statute Whose Validity Is Involved

Minnesota Statutes, 1941, Section 80.26, was passed on April 28, 1941, as Section 18, Chapter 547, Laws of Minnesota for 1941, being a part of a general revision of the Minnesota Securities (Blue Sky) Law, to become effective on July 1, 1941. It provides (the italicized portion being the basis of the judgment from which this appeal is taken):

"3996-24. Other actions or prosecutions not limited.—No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, *provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date*, and provided further that no purchaser of a security otherwise entitled thereto shall bring any action for relief of the character above set forth who shall have refused or failed, within 30 days after the receipt thereof by such purchaser, to accept a written offer from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of repayment, such interest to be computed at the same rate as the fixed interest or dividend rate, if any, pro-

vided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser on such securities. Any written offer so made to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commissioner of securities prior to the delivery thereof to such purchaser.

"Nothing in this section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the state to punish any person for any violation of law."

IV

Statement of the Case

The Minnesota Supreme Court held: (a) that the state legislature enacted the italicized clause of the statute because it was "dissatisfied" with the decision and final judgment of that same court in this very same case, entered in appellant's favor several months prior to the passage of the law and which declared appellee's cause of action for violation of the Blue Sky law barred; (b) that the clause was intended to revive barred causes of action for breach of the Blue Sky law and that it in legal effect nullified the final judgment and permitted appellee to recover on such barred cause of action, and (c) that the legislature had the power to do so under the due process clause of the federal constitution.

This decision and judgment thereon were entered over appellant's contentions that the statute, as so construed, violated the due process clause of the Fourteenth Amendment; that it constituted unreasonable class legislation in violation of the equal protection clause; and that appellant had been denied a fair trial, contrary to due process, on the issue of legislative intent.

Appellant urges each of such contentions on this appeal as a separate ground for reversal of the judgment.

1. *General Nature*

The action was brought in the lower Minnesota court in November, 1937, to recover the purchase price of certain combined shares of stock of appellant (then known as Chase Securities Corporation) and The Chase National Bank, which were sold by appellant to appellees' testate[1] in Minneapolis eight years before, on August 10, 1929. The suit was based on two separate causes of action: first, that the sale of the security, without registration under the Blue Sky Law of Minnesota,[2] was in violation of that law and void, and second, that appellant committed common law fraud in sale misrepresentations (R. 1-11).

2. *Rulings of Trial Court and Prior Appeal to Minnesota Supreme Court.*

The case was tried by the court without a jury in 1939, on both causes of action (R. 24, f. 81). On April 18, 1940, the trial court made findings of fact and conclusions of law on the one cause of action only of statutory violation, holding that the stock was subject to the registration provisions of the Minnesota Blue Sky Law, that such law had been violated by failure to register the stock, and that the six year statute of limitations, expressly covering actions "upon a liability created by statute" (Mason's 1927 Minn. Stat., Sec. 9191, subdiv. 2, now known as Minn. Stat. 1941, Section 541.05 (2)) had been tolled by the withdrawal of appellant from Minnesota in 1931 as permitted by statute (R. 244-259, ff. 1061-1082).

[1] While the second appeal in the state court was pending, the plaintiff died, and appellees were substituted as her representatives. The designation "appellee" is here used.

[2] Chapter 80, Minn. Stat. 1941, then known as Sec. 3996-1 to 28, Mason's 1927 Minn. Stat.

From the final money judgment entered on these findings on June 18, 1940, for the amount of the purchase price paid by appellees for the stock, plus interest and less dividends received, appellant appealed to the Supreme Court of Minnesota (R. 274-276, ff. 1096).

On *January 17, 1941*, that court reversed the trial court judgment, holding (by reference to the companion case of *Robinson v. National City Company*, 209 Minn. 155, 296 N. W. 513, see opinion at R. 353-362) that the cause of action predicated upon a violation of the registration provisions of the securities law, had been barred by such six year statute of limitations, and that the withdrawal of appellant from Minnesota, having left agents for service of process as required by the Minnesota Corporation and Blue Sky Laws, did not toll the statutory period. A judgment reversing the trial court judgment of June 18, 1940, was entered by the State Supreme Court on *March 7, 1941*, and the case was remanded for determination of the remaining issue of fraud, *Donaldson v. Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518. (See opinion at R. 362, ff. 1765, judgment of reversal at R. 363, and mandate at R. 276, ff. 1106.)

3. Rulings of Trial Court After Remand

On *April 4, 1941*, appellee filed alternate motions in the trial court "for an order supplementing and correcting" the previous findings of April 18, 1940, or for a new trial, with reference only to the cause of action based on fraud (R. 277, 284, ff. 1101-1113).

While such motions were pending and on *April 22, 1941*, the Minnesota Legislature enacted a general revision of the Blue Sky Law, known as Chapter 547, Laws of 1941, which became law on April 28, 1941. Section 18 thereof (quoted on page 3 hereof), although entitled as an amendment of Section 3996-24, Mason's 1927 Minn. Stat., was substan-

tially a new section providing a specific statute of limitations for Blue Sky actions.

The parties in May, 1941, made cross-motions for amended findings, appellee moving for an additional finding that appellee's cause of action, based on a violation of the Blue Sky Law, was "revived" by the above mentioned 1941 Statute (R. 285-286, ff. 1113-1116).

Appellant moved for findings in its favor (R. 287-294, ff. 1116-1127), and objected specifically to this proposed finding of revival, upon the ground that the statutory cause of action had already been adjudged barred by the State Supreme Court in this very case under the then existing statute of limitations, and that the 1941 law did not apply to this case and could not revive such barred action (R. 292, f. 1124; R. 293, f. 1126; R. 294, f. 1126).

The trial court, on June 27, 1942, filed findings of fact and conclusions of law for appellee, and on the reasserted cause of action for statutory violation, found (third paragraph of Findings XXXII, at R. 313-314, f. 1157):

> "In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, Secs. 3956-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota."

Appellant on September 8, 1942, moved to amend the court's finding as to the 1941 law (R. 317-335, ff. 1164-1215), by striking out the above paragraph (R. 323, f. 1173, par. No. 22) and conclusions of law and substituting in lieu thereof a conclusion of law (R. 326, f. 1177) that the action was barred and not revived by the 1941 law, or, in the alter-

native, for a new trial, upon these grounds: that there was no competent evidence to support such finding of fact or conclusion of law (R. 328, f. 1180, par. No. 1); that the cause of action, if any, for violation of the securities law was barred by the final adjudication of the State Supreme Court in this very case (R. 328, f. 1180, par. No. 4); that the cause of action was barred by the applicable statute of limitations; that the 1941 law could not apply to this case and did not, and could not, revive the barred cause of action (R. 328, f. 1180, par. No. 6); and, if so applied, it would deprive appellant of its property without due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution (R. 338, f. 1195-1196, par. No. 13).

These motions were denied in their entirety (R. 350-351, ff. 1216-1218), and judgment for appellee was entered on November 25, 1942 (R. 351-352, ff. 1218-1223).

4. *The Second Appeal to Minnesota Supreme Court, Resulting in Judgment upon Which This Appeal Is Based.*

On the second appeal to the Supreme Court of Minnesota, appellant assigned errors (R. 364-400, ff. 1768-1815) in the denial of appellant's alternative motions for amended findings of fact, conclusions of law and order for judgment, or for a new trial in its favor (R. 364, f. 1678, par. No. 4), and included specifically the findings of fact and conclusions of law relating to the construction and application of the 1941 law.[1]

[1] Specific assignments of error covered the making of Finding of Fact XXXII to the effect that the 1941 statute applied and extended the appellee's time to bring the statutory cause of action, and the denial of appellant's motion to strike said finding and conclusions of law based thereon, or for a new trial (R. 384-385, ff. 1794-1796, par. No. 31); and the denial of appellant's motion to substitute a conclusion of law that the action was barred and not revived by the 1941 law (R. 398-399, ff. 1853-1854, par. No. 42a).

These assignments of error were argued in the briefs of both parties. Appellant stressed particularly the absence of legislative power under the due process clause of both state and federal constitutions, to revive a barred statutory cause of action, especially where the state Supreme Court had already adjudged that appellee's cause of action for violation of law no longer existed.

The State Supreme Court by its decision rendered on December 31, 1943 (R. 401-409) held: (a) that appellant's failure to register the stock in Minnesota in 1929 constituted a violation of the securities law; (b) that the legislature had in mind this appellant and its sales of stock in this state in 1929 and specifically intended to overcome the effect of the decision on the prior appeal in this case and in the companion case of *Pomeroy* v. *National City Co.*, and to allow purchasers of such stock one year from July 1, 1941, to commence suits against this appellant on causes of action for statutory violation as to sales of this particular stock, and (c) that the legislature had the power under the due process clauses of both state and federal constitutions to revive plaintiff's cause of action for violation of the statute in this very case, already declared barred by the court on the prior appeal. The principal authority cited for these conclusions was the case of *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, concerning which the Minnesota Supreme Court said, in part:

> "We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court."

The opinion said that the rule of the case of *Danzer & Co., Inc.* v. *Gulf & Ship Island Ry. Co.* (1935) 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612, was not applicable.

The decision was based solely on this one issue (R. 402-403, f. 1818). Judgment for appellee for the purchase price of the stock was affirmed.

Appellant filed a petition for rehearing (R. 410-463, ff. 1836-1915), wherein it again contended that the statute, as so construed by the court, denied appellant its property without due process of law as guaranteed by the due process clause of Section One of the Fourteenth Amendment to the Federal Constitution for the reasons above stated (R. 438-446, ff. 1877-1888, Points III and IV); that the law, as so construed and applied by the court, violated the equal protection clause of Section One of the Fourteenth Amendment in that such law, as so construed, constituted class or special legislation against appellant and in favor of purchasers of its stock (R. 446-452, ff. 1889-1897, Point V).

Appellant also urged upon the petition for rehearing that the Court's finding that the legislature intended to revive barred claims generally was made without record evidence in support thereof (R. 416-438, ff. 1845-1877); that the appellant had no opportunity to submit evidence on legislative intent at the original trial (the law not being in existence then); that it was denied the right to do so on its motion for a new trial; that it was entitled to know the facts of which the Supreme Court seemingly took judicial notice; that it was entitled to an opportunity to submit evidence to refute the erroneous assumptions made; and that if the Supreme Court of Minnesota refused to afford appellant such opportunity (by remanding or referring the case for evidence on that issue), appellant would be denied a fair trial and due process of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 412-413, ff. 1840-1841, Point II, R. 417-420, ff. 1845-1852).

The petition was denied without opinion on February 23, 1944 (R. 474, f. 1936), and the judgment, upon which this appeal is based, was entered on the same day (R. 475, f. 1937).

The federal questions were properly and promptly raised and preserved in the state courts.

Such judgment does not rest on a state ground which independently and adequately supports it. If the statute in question, as here construed and applied, is found by this Court to be violative of the due process or equal protection clauses of the Constitution of the United States, the judgment must be reversed.

V

Specification of Errors

The Supreme Court of Minnesota erred in holding, contrary to the timely contention of appellant:

1. That said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution, even though such construction results in the abrogation of a previous adjudication of the Supreme Court of the State of Minnesota between the same parties in the same case, *Donaldson v. Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518.

2. That said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of such Fourteenth Amendment, even though such construction results in the revival of a statutory cause of action for breach of the Minnesota Blue Sky Law which had become barred by the then applicable Minnesota statute of limitations covering actions "upon a liability created by statute."

3. That said Law, as construed and applied in this case, does not violate the equal protection clause of such Fourteenth Amendment, even though such construction results in class or special legislation which was found by the Court to have been specifically intended to impose liability upon appellant and one other corporation and in favor of the purchasers of stock from these specific corporations.

4. That appellant was not entitled to a trial, as guaranteed by the due process clause of such Fourteenth Amendment, on the vital issue of intent of the state legislature, on which issue the Court found without trial that the legislature specifically intended to reverse a rule of law already declared by the Court in appellant's favor in this very case, and to impose liability upon appellant and in favor of the owners of a particular stock sold by appellant contrary to the previous final adjudication between the parties in this case.[1]

VI

Argument

Summary

Appellant submits that the 1941 Minnesota statute, as construed and applied by the State Supreme Court violated the due process and equal protection clauses of the Fourteenth Amendment for the reason:

1. That the law reversed a prior and final judgment of the highest court of the state in the same case, as to appellant in whose favor such judgment had been entered on the

[1] A ground of error, not itself a basis for appeal but includable as error to be assigned on appeal from a judgment sustaining the validity of a state statute against a claim of unconstitutionality. *Prudential Insurance Co. v. Cheek* (1921), 259 U. S. 530 at 547, 66 L. Ed. 1044, 42 S. Ct. 516, and *Fleitmann v. Welsh* (1944), 321 U. S. 253, 88 L. Ed. 475, 64 S. Ct. 548.

merits of the claim that the statutory cause of action was barred.

2. That the law revived a cause of action against appellant, founded upon breach of a statute, long after that cause of action had become barred under previously existing law.

3. That the law was one enacted for the specific purpose (so the State Supreme Court found) of reversing a rule of law previously established by the highest court of the state in this very case, so as to allow an arbitrary class of litigants to maintain already barred actions against two particular corporations including this appellant.

Appellant also submits that the judgment of the State Supreme Court violates the due process clause guaranteeing a fair trial, because it is predicated upon a finding of legislative intent with reference to the 1941 statute made by the Supreme Court, seemingly by its judicial notice of "facts" as to which the appellant did not have the opportunity to ascertain and hear evidence and to dispute such evidence by other proof or argument.

Points and Authorities

1

The 1941 law, as here construed and applied, deprives appellant of its property without due process of law, because it reverses a prior and final judgment of the highest state court in the same case in favor of appellant, in which judgment appellant had a vested right.

(Specification of Error No. 1)

The judgment of the State Supreme Court, entered in this case on March 7, 1941, as the determination of the first appeal, was a final judgment based upon an opinion in

favor of appellant upon the one issue there presented: whether the cause of action for breach of the registration statute had become barred by the statute of limitations (opinion, R. 353-363, and judgment, R. 363). It reversed a trial court decision that the action for violation of the registration statute was not barred (See Par. XV, (R. 252-253), par. XVII (R. 254), and par. XXIII (R. 257) of Findings of Fact.) That decision was confined to that one cause of action which the trial court had expressly found to be "independent" of the fraud-claim (See par. XXVI (R. 258)).

The State Supreme Court remanded the case for further proceedings on "issues other than" the statutory cause of action. The only issue which remained was the "independent" cause of action for alleged fraud, and that alone. Even appellee so construed the opinion and judgment because her next and only step in the trial court was an alternate motion for findings or a new trial only on the "issues of fraud, implied fraud, and fraud by concealment" (R. 277-282, at R. 282, f. 1109).

The statutory cause of action at all times was litigated by both parties and decided by both the trial court and State Supreme Court as though it had been alleged in a pleading entirely separate from the fraud claim. It was a separate cause of action in every sense, even though it was inartistically pleaded in combination with the cause of action for fraud. A money judgment was entered in the trial court upon that cause of action. If no appeal had been taken, it would have finally disposed of the entire case. The State Supreme Court judgment of reversal on the first appeal was decisive and final as to that cause of action.

There was nothing novel in the Court's treatment of the violation of the Blue Sky law as creating a separate and distinct cause of action, complete in itself. It was done in *Burzinski* v. *Kinyon Investment Co.* (1934), 192 Minn.

335, 256 N. W. 233, where both fraudulent representations and violation of the Blue Sky law were relied upon. It was done in *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, 239 N. W. 672, where suit was brought under a similar type of statute making it unlawful for directors to accept deposits in an insolvent bank. It is in line with the well-settled rule in Minnesota that a violation of the Blue Sky law without proof of more, confers a right on the purchaser to recover the consideration paid for unqualified securities. *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672; *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806; and see footnote 5 on p. 23, infra.

This Court has also considered exactly the same type of case arising out of similar litigation in the Federal Court, where the plaintiff relied upon the same two causes of action, one for breach of the registration statute and one for alleged fraud in sales representations, which were pleaded in substantially the same form and manner as in the case at bar. (See record on application for certiorari to this Court in *Chase Securities Corporation* v. *Vogel*, *infra*, at pp. 16-21.) In *Chase Securities Corporation* v. *Vogel* (1940), 110 F. (2d) 607, the Circuit Court of Appeals for the Eighth Circuit, relying on Minnesota law, treated the cause of action for violation of statute as a distinct cause of action, and held that it was not barred by the tolling provision of the statute of limitations and affirmed the judgment of the District Court on this cause of action alone. In *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, 61 S. Ct. 823, the judgment of the Circuit Court was reversed on the authority of the judgment of the Minnesota court in the case at bar (R. 362) and in the related case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513 (R. 353-362). The *Vogel* case was remanded to the Circuit Court of Appeals "for further proceedings

with respect to any question not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases." This Court thus recognized that the prior judgment in this case was an adjudication of the statutory cause of action and relied upon it as final.

Such conclusion is well sustained by principles of law established by this Court. The State Supreme Court's decision in January, 1941, was a determination of law and was similar to that of a judgment entered on a demurrer to the pleading. In fact, that was the situation in the companion case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513. There are numerous cases of this Court holding that a decree dismissing a complaint as a matter of law, on grounds apparent on its face, is a conclusive adjudication on the merits. *Lawrence* v. *Nelson* (1891), 143 U. S. 215, 36 L. Ed. 130, 12 S. Ct. 440; *Lyon* v. *The Perin and Gaff Mfger Co.* (1887), 125 U. S. 698, 31 L. Ed. 839, 8 S. Ct. 1024. It is just as much so as a judgment rendered upon proof. In both cases, such a judgment is *res adjudicata*. *City of Aurora* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42; *Northern Pacific Co.* v. *Slaght* (1906), 205 U. S. 122, 51 L. Ed. 738. See Annotations in 13 A. L. R. 1104, supplemented in 106 A. L. R. 437.

It is inconceivable, therefore, that appellees could have successfully sought a new trial, or recommenced an action on that claim. As said long ago by the State Supreme Court in *Jordan* v. *Humphrey* (1884), 32 Minn. 522, 21 N. W. 713:

> "In such case, a new trial would be useless, and the reversal is in effect an end of the case."

This Court said, in *United States* v. *Leffler* (1837), 11 Pet. (U. S.) 86, at 100-1, 9 L. Ed. 642, at 647:

> "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judica-*

tum, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

See, to some effect, *Hamer* v. *New York Railways Co.* (1916), 244 U. S. 266, 61 L. Ed. 1125, 37 S. Ct. 511.

It follows necessarily that the cause of action for breach of statute, so adjudicated and "merged and gone forever," was not pending in any sense after the case was remanded on the other cause of action and when the 1941 law was passed. Only *one* cause of action continued to pend—the one for alleged fraud. Not until *after* the 1941 law was passed did appellees make claim that the statutory action was back in the case. They frankly asserted that such cause of action was "revived" by the new statute (R. 285 at 286, f. 1115) thereby conceding that such cause was dead and gone until the law was passed.

It is readily apparent that both courts considered and decided the question of revival as though the prior judgment in this very case was entitled to no legal effect whatsoever. The State Supreme Court merely concluded that the legislature did not violate the state and federal constitutions "by lifting the bar" where the statute of limitations had run, "even though it was passed subsequent to a determination by this Court that the cause was barred." (216 Minn. 269, at 277).

Disregard of the prior and final adjudication of the statutory cause of action lead inevitably to error. Certainly that judgment in appellant's favor constituted personal property and a valuable right, which thereby became vested in appellant. The very case which the State Supreme Court cited as its principal authority, *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, said unanimously that such a right cannot constitutionally be divested by subsequent legislative act.

Apart from the *Campbell* case, the rule has long been established by this Court that a litigant has a vested right

in a judgment in his favor which cannot be altered or destroyed constitutionally by an act of a state legislature. *United States* v. *Peters* (1809), 5 Cranch 115, 3 L. Ed. 53; *Mason* v. *Haile* (1827), 12 Wheat. 370, 6 L. Ed. 660; *United States* v. *Klein* (1871), 13 Wall. 128, 20 L. Ed. 519; *Memphis* v. *United States* (1877), 97 U. S. 293, 24 L. Ed. 920. All State Courts have accepted the rule without question. See collection of cases in *3 A. L. R. 450.* A vested right in an existing defense is granted the same protection, *Pritchard* v. *Norton* (1882), 106 U. S. 124, 27 L. Ed. 104, 1 S. Ct. 102. In *McCullough* v. *Virginia* (1898), 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134, it was said:

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

The judgment there entered was held to be unaffected by a subsequent repeal of the act on which the judgment was obtained.

This Court reasserted the rule and followed it in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 S. Ct. 325. In *Hodges* v. *Snyder* (1923), 261 U. S. 600, 67 L. Ed. 819, 43 S. Ct. 435, it was acknowledged to be well settled that "private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." More recently, the rule was observed by comment in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600 (footnote 25 of opinion).

Early in this term, this Court gave consideration to the question of legislative revival of a cause of action already

adjudicated. In *Allen Pope, Petitioner* v. *United States* (decided November 6, 1944), — U. S. —, 89 L. Ed. 5, 65 S. Ct. 16, a Special Act of Congress had been enacted which allowed a named, specific party to assert a new claim for construction work against the government in the Court of Claims, although such court previously had given final judgment for the government and this Court had denied certiorari. The Court of Claims held the Act unconstitutional because it required that court to set aside a final judgment in that very case, citing *United States* v. *Klein* (1871), 13 Wall. 128. This Court reversed the order of the Court of Claims, however, upon this limited ground: that the Act did not set aside any prior adjudication but created a "*new obligation*" on the part of the government, although the physical work was the same as had been litigated, and that Congress had the constitutional power (under Art. I, Sec. 8 of the Constitution and prior decisions) to impose "on the government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the government and for which Congress thought he had not been adequately compensated." The opinion is clearly restricted to this precise issue:

> "We do not consider just what application the principles of the Klein case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for determination of a pending case.
>
> . . . . . .
>
> "The special act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner."

The very situation, which this Court held was not existent in the above case, is present in the case at bar. In the above case, Congress merely acted for itself and as an agent or arm of the United States government, against whom the new liability was created. In the case at bar, the early judgment was in favor of a citizen, this appellant, and no agent of the citizen made a new promise or created a new liability. The State of Minnesota attempted to act, not for, but against this appellant, not even to create a new right but to set aside an adjudicated and settled right. It was held that the act was intended to change the law (or "rules of decision") as applied to the case at bar with which the legislature was "dissatisfied," and that the law could be so applied constitutionally so as to result in setting aside the prior final judgment and "to require a new trial of the issues" previously adjudicated. We submit, therefore, that the direct implications of this Court's language, quoted above, necessarily sustain the legal principle underlying appellant's contention here.

The State Court's decision so construed and applied the 1941 law in this case that it has resulted in the destruction of the vested right which appellant had in the prior and final judgment holding the statutory cause of action barred. It is contrary to the applicable decisions of this Court which have reaffirmed time and again a rule of constitutional law established for more than a century.

2

The 1941 law, as here construed and applied, deprives appellant of his property without due process of law, because it revives a statutory cause of action which had become barred by the then applicable statute of limitations.

(Specification of Error No. 2)

The broader question of legislative power to revive a statutory cause of action, barred under a statute of limi-

tations expressly covering "a liability created by statute," has never been squarely determined by this Court. The state court decision, however, is contrary to the clearly stated principles of this Court's applicable cases.

Appellee's cause of action was one to recover the purchase price paid to appellant for stock allegedly sold in violation of the Minnesota Blue Sky Law. On the prior appeal, the State Supreme Court held the action was one founded "upon a liability created by statute," that it was barred by reason of Mason's 1927 Minn. Stat. Sec. 9191, subdiv. 2 (now Minnesota Statutes 1941, sec. 541.05 (2)), which provided:

> "9191. Various cases, six years—The following actions shall be commenced within six years:
>
> * * * * * * *
>
> "2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture. * * *."

and that that statute of limitations was not tolled by appellant's qualified departure from the state.

In the decision now on appeal before this Court, the state court failed to note or to give necessary weight to the two significant factors, i. e., that the action was one predicated entirely upon a breach of statutory duty and that the limitations statute applied to it on the first appeal was a special statute expressly restricted to such statutory actions. Instead, the opinion, quoted below in part, shows that the action was considered as though it were one to recover upon a common law liability and as though the limitations statute were a general "catch-all" statute covering any kind of common law action and applying only to the remedy:

> "In *Campbell v. Holt*, the Supreme Court held that a statute which applied merely to the remedy did not

vest such a right in the defendant that the legislature or, in that case, the constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

* * * * * * * * *

"We do not find that *Campbell v. Holt* has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court.

"Statute of limitation which only bar the recovery of a *debt* or *damages for tort* are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of *such* statutes may be lifted without violating the due process clauses of either the state or federal constitutions. See also *McEldowney v. Wyatt*, 44 W. Va. 711, 45 L.R.A. 609; Orman v. Arsdell, 12 N. M. 344, 67 L.R.A. 438.

"We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to *this* case.

"The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, or the Federal Employers Liability Act, and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. G. N. Ry. Co. 92 Minn. 184, 99 N. W. 620, 104 A. S. R. 674, 2 Ann. Cas. 150; Kannellos v. G. N. Ry.

Co. 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126." (Italics ours.)

The State Court erred in these respects, seemingly to make it appear that the *Campbell* case was in point.

As to the nature of the action, it has been well settled by the State Supreme Court for two decades that an action of this kind, to recover the purchase price of securities sold in violation of the Blue Sky law, is a statutory cause of action, which cannot exist except for such statute. *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672; *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806; *Edson* v. *O'Connell* (1934), 190 Minn. 444, 252 N. W. 217; *Mertz* v. *Hudson Mfg. Co.* (1935), 194 Minn. 636, 261 N. W. 472.[5] That law created a liability where none existed at common law. The statutory basis of the action is controlling. Calling it an action of damages for

[5] Although the Blue Sky Statute of Minnesota has at no time since its original enactment in 1917 (Ch. 429, Laws 1917), its first revision in 1925 (Ch. 192, Laws 1925), and second revision in 1941 (Ch. 547, Laws 1941), provided any express civil remedy, purchasers of securities have been allowed to recover upon the theory that the statute was for the protection of one class against the imposition of another class. The violation of law does not merely create a rule of evidence or a circumstance to be considered in a fraud case. See *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 627-628, 238 N. W. 12, 239 N. W. 672; *Byrzinski* v. *Kinyon Investment Co.* (1934), 192 Minn. 335, 341-342, 256 N. W. 233. For statutes in other states which are similarly treated, see *Schmidt* v. *Merchants Despatch Transp. Co.* (1936), 270 N. Y. 287, 200 N. E. 824, 104 A. L. R. 450 and note (statute requiring protective devices against dust); *Amberg* v. *Kinley* (1915), 214 N. Y. 531, 108 N. E. 830 (statute requiring factories to be equipped with fire escapes); *Karpeles* v. *Heine* (1919), 227 N. Y. 74, 124 N. E. 101 (statute forbidding employment of infant under 16 years as an elevator operator); *Bank of Palmer* v. *Haley* (1929), 127 Kan. 544, 274 Pac. 265 (bulk sales statute); *City of Phoenix* v. *Drinkwater* (1935), 46 Ariz. 470, 52 Pac. (2d) 1175 (minimum wage law); *Nichols* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6th, 1912), 195 Fed. 913 (Safety Appliance Act).

tort arising from violation of the statute (as the court did on the second appeal) cannot alter its essential character.

A mere reading of the Minnesota limitations statute covering statutory actions (Mason's 1927 Minn. Stat., Sec. 9191 (2)), quoted above, shows that it is not a general limitations statute which is applied to common law actions on contract or for a tort or to any miscellaneous actions "as to which no other limitation is expressly prescribed."[6] Although the state securities law itself did not then contain a time-limitations section for actions brought for violations of it, this specific limitations provision had been found, in legal effect, to be an integral part of that law by judicial construction, as much as if the two had been enacted together. *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513; *Burzinski* v. *Kinyon Inv. Co.* (1934), 192 Minn. 335, 256 N. W. 233; see *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, and *Szroka* v. *Northwestern Bell Telephone Co.* (1927), 171 Minn. 57, 213 N. W. 557. The one statute conditioned the right to recover on the liability created by the other statute, even though they were enacted at different times and appeared under different titles in the statute book.

a. *Inapplicability of Campbell* v. *Holt:*

From what has been said, it follows, we submit, that the State Supreme Court erred in deciding that the case at bar was controlled by the rule of *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, in which, by a divided court and with a vigorous dissent, it was held that the remedy on a *common law action* "for violation of an implied

[6] Such a "catch-all" limitations provision in the Minnesota law is Mason's 1927 Minn. Stat. Sec. 9191, sub. 1, which provides a six year limitations period in actions "1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed."

contract to pay money," previously barred by a *general* limitations statute, could be constitutionally revived by suspension of that statute. The State Court likewise erred in holding that the case of *Danzer & Co.* v. *Gulf & Ship Island Ry. Co.* (1925), 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612, was not applicable, and by failing to consider *Davis* v. *Mills* (1904) 194 U. S. 451, 48 L. Ed. 1067, 24 S. Ct. 692. We submit that the legal principles of both of these cases are applicable to the case at bar, pertaining as they do to causes of action created by statute, rather than the *Campbell* case whose rule is restricted to a common law action for debt.

Davis v. *Mills* involved an action to recover a liability from corporate directors for violation of a duty imposed by statute. It was held that such statutory cause of action was conditioned by a limitations provision which covered actions against corporation directors "to enforce a liability created by law," although (as here) such provision was enacted "at a different time" and was located in a title different from that containing the statute creating the liability. This Court (through Mr. Justice Holmes) first noted that "ordinary" limitations statutes are treated as laws of procedure affecting the remedy only and not the right. The opinion continued:

> "But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limita-

tion goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

It was observed, also, that to deny all remedy is practically to deny the right, a principle already acknowledged as to land and "even" as to chattels (for which was cited *Campbell* v. *Holt*), and that, all the more, a special limitations statute should be construed to condition a cause of action created by statute.

Moving forward from this proposition, the law of the *Danzer* case establishes the conclusion that appellee's cause of action, arising from breach of a duty imposed by statute which was conditioned by a limitations provision contained in the same statute "or another provision," could not be revived by a later legislative act without violating the due process clause. The Court said:

> "We need not re-examine the doctrine of *Campbell* v. Holt, 115 U. S. 620, 29 L. Ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money * * * The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional."

Distinguishing the common law action for debt from a cause of action created by statute, the opinion said:

> "But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability."

Appellant submits that the combined principle of the *Davis* and *Danzer* cases is directly applicable and controlling here, as against the rule in the *Campbell* case. The limitations provision, section 9191, subdivision 2, relating expressly to actions "upon a liability created by statute," conditioned the right to enforce the liability created by the registration statute, within the rule of construction of statutory causes of action laid down in the *Davis* case. The attempt to revive such a barred cause of action is a violation of the due process clause.

The case of *Campbell* v. *Holt* is inapplicable here, both on fact and upon legal principle. The rule of the *Davis* and *Danzer* cases requires a reversal.

b. *The Error of Campbell* v. *Holt, Were It Applicable:*

If, however, it is to be assumed or here found that the State Court correctly interpreted and applied the *Campbell* case, appellant submits that that decision should be re-examined and over-ruled, as a matter of sound public policy and correct law.

We may well begin with the learned and realistic dissenting opinion of Justices Bradley and Harlan in that case, wherein these principles were advocated: that the right of defense given by a statute of limitations to one party is as valuable a property right, once it has accrued, as the right of action is to the other party; that both rights should be protected by the Fourteenth Amendment from legislative aggression; that statutes of limitations serve an honorable social purpose and should be respected; and that the right of defense on this ground is a remedy of a defendant which is as much a right as the right itself, i. e., "remedies are the life of rights, and are equally protected by the Constitution."

It is significant that this Court has not since squarely considered the holding of the sixty-year old *Campbell* case.

with reference to its soundness as a matter of public policy.

Thus far, this Court has followed or approved only its *dicta* determining that in cases involving title to real estate or personal property, there could be no constitutional revival of a barred cause of action, *Sharon* v. *Tucker* (1892), 144 U. S. 533, 36 L. Ed. 532, 12 S. Ct. 720; *Toltec Ranch Co.* v. *Cook* (1903), 191 U. S. 532, 48 L. Ed. 291, 24 S. Ct. 166; *Davis* v. *Mills, supra; Northern Pac. Ry. Co.* v. *Ely* (1905), 197 U. S. 1, 49 L. Ed. 639, 25 S. Ct. 302; *Stewart* v. *Keyes* (1935), 295 U. S. 403, 79 L. Ed. 1507, 55 S. Ct. 807. In none of these cases was it indicated that the rule would be otherwise as to a barred statutory cause of action not involving title.

Such comments as this Court has made, touching upon the wisdom of the *holding* of the *Campbell* case, would indicate that the decision has not been favored but has been narrowly distinguished and restricted to its own facts. See *Davis* and *Danzer* cases, above. Furthermore, this Court both prior and subsequent to that decision has repeatedly favored a public policy which would permanently bar "ancient claims"—a policy contrary to the ultimate result of legislative revival. Thus, in *Bell* v. *Morrison*, (1828), 26 U. S. (1 Pet.) 351, at 360, 7 L. Ed. 174, at 178, the statute of limitations was described, by Mr. Justice Story, as "a wise and beneficial law" designed "to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses." That approval has been reaffirmed in numerous cases, such as *Campbell* v. *Haverhill* (1894), 155 U. S. 610 at 617, 39 L. Ed. 280, 15 S. Ct. 217, and *Guaranty Trust Co. of N. Y.* v. *United States* (1937), 304 U. S. 126, 82 L. Ed. 1224, 58 S. Ct. 785.

Again, this Court has frowned upon the broad acceptance of a rule of legislative revival of barred actions when,

in *Graham* v. *Goodcell* (1930), 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186, it sustained the validity of a special statute[7] enacted in favor of the United States to enable the collection of barred tax claims. The opinion did not cite the case of *Campbell* v. *Holt* or discuss its rule, as did several of the lower federal court decisions from which the appeal was taken.[8] Rather, it approved the special law on the narrow ground that it was "a curative statute aptly designed to remedy mistakes and defects in the administration of the government" (282 U. S. at 429). It added that a distinction could be made between that particular kind of revival statute and "a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention." We submit that the statute in the case at bar is definitely of this kind.

The same apparent reluctance of this Court to approve on broad principle the revival of barred claims is noted in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600, where a special enactment by Congress to allow an appeal from an administrative order under a federal compensation act, after the regular time for appeal had expired, was sustained as a law "to cure a fault of administration" of such law, citing the *Graham* v. *Goodcell* case, especially where the revival affected only an administrative order rather than a prior "judicial judgment."

In addition to these indications of doubt, we point out that this Court has recently noted the preferred policy for construction of limitations statutes long ago suggested by

[7] Sec. 611 of Rev. Code of 1928 (26 U. S. C. A. Sec. 2611).

[8] Such as *Wright & Taylor* v. *Lucas* (1930—C. C. A. 6th Cir.), 45 Fed. (2d) 75; *Regla Coal Co.* v. *Bowers* (1929—D. C. N. Y.), 37 Fed. (2d) 373; *Oak Worsted Mills* v. *United States* (1929—Ct. of Cl.), 36 Fed. (2d) 529.

Mr. Justice Holmes in the *Davis* case. In *Home Insurance Co.* v. *Dick* (1930), 281 U. S. 397, at 409, 74 L. Ed. 926, 50 S. Ct. 338, after citing the *Campbell*, *Davis*, and *Danzer* cases, this Court said (in footnote 7 of the opinion):

> "Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine."

The same general question was also mentioned, but not decided in *Mid State Horticultural Co.* v. *Pennsylvania Rd. Co.* (1943), 320 U. S. 356, 88 L. Ed. 83, 64 S. Ct. 128, wherein the *Davis* and *Danzer* cases again were cited.

The federal courts have not accepted the majority rule of the *Campbell* case in any determination of rights as between two ordinary litigants. Several of them[9] have applied the *Campbell* case to uphold the validity of the tax claim revival statute discussed in *Graham* v. *Goodcell*, *supra*. But in so far as the acceptance of the *Campbell* case for this purpose is concerned, they are in effect overruled by this Court's decision in the *Graham* case, wherein neither the *Campbell* case nor its holding was mentioned and revival was allowed only upon the narrow ground above discussed.

In the light of the judicial history of the *Campbell* case in both this Court and the federal courts, it is not surprising to find that the vast majority of the highest state courts have expressly followed the principle and reasoning of its dissenting opinion, as a matter of public policy,

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[9] Representative of such federal cases are the following: *Pittsburgh Can Co.* v. *United States* (1940—C. C. A. 3rd Cir.), 113 Fed. (2d) 821; *City of Sour Lake* v. *Branch* (1925—C. C. A. 5th Cir.), 6th Fed. (2d) 355; *Huntley* v. *Gile* (1923—C. C. A. 9th Cir.), 32 Fed. (2d) 857; *United Thacker Coal Co.* v. *Commissioner* (1931—C. C. A. 1st Cir.), 46 Fed. (2d) 231. These and other cases are so grouped in an annotation in 133 A. L. R. 384 at 388.

and that most of the legal writers on the subject have disapproved of the doctrine of legislative revival of barred claims.

At least eleven State Supreme Courts have so held;[10] in only three states has the majority view of the *Campbell* decision been applied to cases not involving special circumstances.[11] Furthermore, none of those three cases involved a statutory cause of action. See annotations in *36 A. L. R. 1316*, and *133 A. L. R. 384*; and *34 Am. Jur. sec. 35, p. 39*. The writers who have considered *Campbell* v. *Holt* have questioned the theoretical distinction made in that case and have favored the dissenting opinion. *Lewis' Sutherland, Statutory Construction* (2nd ed.) Vol. 2, sec. 708, p. 1288; *Wood, Limitations* (4th ed.), Vol. 1, sec. 11, pp. 47-49; *24 Columbia Law Review*, 803 (1924); *10 Cornell, L. Q.* 212 (1924); *2 Geo. Wash. L. Rev.* 100 (1933). See, also *Rottschaefer, Constitutional Law* (1939), sec. 252, p. 548-9.

In a few states, legislative revival of barred rights have been sustained under the peculiar circumstances of the specific cases, the courts in each instance cautiously pointing out that they did not thereby approve a broad or general application of the holding of the *Campbell* case. Thus in *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238

[10] *Wasson* v. *State* (1933), 187 Ark. 537, 60 S. W. (2) 1020; *Bussey* v. *Bishop* (1929), 169 Ga. 251, 150 S. E. 78; *Board of Education* v. *Blodgett* (1895), 155 Ill. 441, 40 N. E. 1025; *Siefkin* v. *Siefkin* (1939), 150 Kan. 396, 92 Pac. (2) 1005; *Jackson* v. *Evans* (1940), 284 Ky. 748, 145 S. W. (2) 1061; *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142; *Wilkes County* v. *Forester* (1933), 204 N. C. 163, 167 S. E. 691; *Raymer* v. *Comley-Lumber Co.* (1934), 169 Okla. 576, 38 Pac. (2) 8; *Cathey* v. *Weaver* (1922), 111 Tex. 515, 242 S. W. 447; *Re Sloan* (1938), 95 Utah 408, 79 Pac. (2) 999; *Eingartner* v. *Illinois Steel Co.* (1899), 103 Wis. 373, 79 N. W. 433; See, also, *Dunbar* v. *Boston & P. R. Co.* (1902), 181 Mass. 383, 63 N. E. 916; and *Hopkins* v. *Lincoln Trust Co.* (1922), 135 N. Y. 213, 135 N. E. 267.

[11] *Orman* v. *Van Arsdell* (1904), 12 N. Mex. 344, 78 Pac. 48; *Gilbert* v. *Selleck* (1919), 93 Conn. 412, 106 Atl. 439; and *Herr* v. *Schwager* (1927), 145 Wash. 101, 258 Pac. 1039.

N. Y. 271, 144 N. E. 579, a special statute was upheld which allowed a widow to sue on a claim which had become barred during the time she relied upon another statute subsequently declared invalid. In *Danforth* v. *Groton Water Co.* (1901), 178 Mass. 472, 59 N. E. 1033; *Dunbar* v. *Boston & P. R. Corp.* (1902), 181 Mass. 383, 63 N. E. 916, and *Mulligan* v. *Hilton* (1940), 305 Mass. 5, 24 N. E. (2d) 676, the Massachusetts court reluctantly approved statutes intended to give relief from technical procedural mistakes and expressly refused to accept the *Campbell* case as a general rule. In *Jackson Hill Coal Co.* v. *Commissioners of Sullivan City* (1914), 181 Ind. 335, 104 N. E. 497, revival was allowed only as to claims against the state or its subdivisions.[12] Mr. Justice Holmes, in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 S. Ct. 325, aptly referred to cases of the kind of *Danforth* and *Dunbar* as being exceptions, arrived at by "various circumlocutions" in order to overcome "some slight technical defect" or to attain "some strongly prevailing view of justice."

In all events, the case at bar is not such a case. The undisputed record shows that appellees' testate had six full years, the well understood statutory period in Min-

[12] Other special situation cases are: *Evans Products Co.* v. *Fry* (1935), 307 Mich. 506, 12 N. W. (2) 448, approved the *Campbell* case only "as applied to our construction of Act 170 (an escheat law) under the circumstances of this case." The broader principles against revival, declared by the earlier Michigan case of *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142 (footnote 10, above), remains unchanged.

Berkin v. *Healy* (1916), 52 Mont. 398, 158 Pac. 1020, involved only a suit to cancel an outlawed mortgage. *Bates* v. *Cullum* (1896), 177 Pa. 625, 35 Atl. 861, held a newly enacted tolling statute applicable to a previously accrued cause of action on contract against a non-resident. In both cases, brief comment on the *Campbell* case was dicta and related only to revival of a barred *debt*.

McEldowney v. *Wyatt* (1898), 44 W. Va. 711, 30 S. E. 239, approved the *Campbell* case only to allow recovery of a barred claim for taxes, the opinion pointing out that "taxes are not a contract or a debt."

nesota, within which to commence an action for breach of the registration law. During that entire period, appellant was amenable to suit either directly or through its duly appointed agent for service of process as provided by statute, after it had withdrawn from active business in Minnesota in 1931, *Pomeroy* v. *National City Company* (1941), 209 Minn. 155, 296 N. W. 513; *Donaldson* v. *Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518. She slept on her rights not only for that period but for more than two years thereafter. There is no evidence that she was confused by any change in the prevailing law, or that there was any oversight in technical procedural matters, or that the original six-year period was inadequate, or that any other special hardship or injustice existed. The "special situation" cases do not apply here, whatever their worth as legal precedent.

The 1941 law, as here construed, revived for one year appellee's cause of action which had been barred by the then applicable limitations statute since August 10, 1935. In other words, this cause of action had been dead for six years.[13] If such a law is now to be sustained, there would be precedent which would encourage any litigant, having once held a cause of action founded either on a common law duty or upon a statute, but which has long since become barred by all existing limitations provisions, to seek and obtain the passage of a law reviving such cause of action, no matter how many years may have elapsed since the transaction. Such a precedent would be dangerous in its economic and social consequences:

> —as to the parties, there would always be the threat of revival at any time long after proof has been lost

[13] If the law is held to be general legislation (rather than special legislation as next contended by appellant), it revived all causes of action for violation of the state Blue Sky Law occurring since it was first enacted in 1917—a period of nearly twenty-five years.

and witnesses have forgotten or have died or disappeared, a danger recognized by this Court for more than a century.

—as to the courts, there would be no end to litigation and the public policy sustaining the limitations provisions, long acknowledged by this Court, to be "a wise and beneficial law," would be defeated.

—as to the legislature, it would invite special interests and lobbies of all kinds, to bring special inducements and pressures upon the legislature and thus subject the latter to unwholesome influences.

—as to the public, there would be unnecessary uncertainty in the law and in business relationships dependent upon it.

Nor can it be argued convincingly that any public policy would be harmed by judicial disapproval of a broad principle allowing legislative revival of any and all barred causes of action, statutory or common law. The statutory exception imposing liability upon a new promise in writing or upon part payment of a barred *contractual* claim (see, for example, Minnesota Statutes, 1941, Section 514.17) would continue on the well accepted theory of a *new* liability rather than a revival of the barred obligation. *Willoughby* v. *Irish* (1886), 35 Minn. 63, 27 N. W. 379. An exception allowing revival of actions to collect barred taxes or to correct administrative mistakes would continue on the narrow rule of *Graham* v. *Goodcell*, supra. The so-called special hardship and injustice cases would necessarily stand on their own peculiar facts and circumstances as to which, if necessary, the *Campbell* case might well be limited. None of these exceptions need be altered to adopt appellant's contention in this case.

We submit that public policy would be better served if this Court were to overrule the holding of *Campbell* v. *Holt* and adopt the principle of its dissenting opinion—that the right to set up the bar of a statute of limitations as a de-

fense to any cause of action (statutory or common law) after the statutory period has run, is a vested right which cannot be taken away constitutionally by subsequent legislation. Such a decision would but follow the long settled policy sustaining all limitations provisions; it would be supported by the more recent expressions of this Court in the *Davis* and *Danzer* cases; and it would remove the legal confusion incident to the unsound and theoretical distinction between statutes of limitations which are said to affect the right and those which are said to affect the remedy. It is difficult, if not impossible, to imagine a case where, in the absence (as here) of special hardship circumstances, such a rule would result in injustice.

The 1941 law, as here construed and applied, deprives appellant of its property without due process of law. The lower court's decision is contrary to the applicable decisions of this Court and to sound public policy. Its only purported basis, the holding of *Campbell* v. *Holt*, should be cast aside if it is applicable to this case at all.

3

The 1941 law, as here construed and applied, denies appellant equal protection of law because it was enacted specifically to reverse the rule of law previously settled in appellant's favor on the first appeal, so as to allow purchasers of appellant's stock to maintain already barred actions against it.

(Specification of Error No. 3)

The State Supreme Court expressly found as follows (216 Minn. 269, at 273-4; see R. 405, ff. 1821-1822):

> "The legislature acted promptly after our first opinion was filed. The inference is plain that it was dissatisfied with the law as laid down in that opinion and regarded

it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute, as had been held in the federal court City Co. of New York v. Stern (8 Cir.) 110 F. (2d) 661.

"That it had all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered. It was well known that a multitude of sales of this and other unregistered stock had been made in this state shortly before the 1929 crash. The evidence in this case shows about 500 sales of Chase units in Minnesota by this defendant in 1929. The legislature must have known that the great bulk of the violations of the statute had occurred prior to the crash and that few, if any, had occurred afterwards. As heretofore stated, defendant effected its withdrawal from the state in 1931. In the National City case (Pomeroy v. National City Co. 209 Minn. 155 N. W. 513), the withdrawal was effected in 1934. If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any cases."

This Court is bound by this construction and application of the statute, "and the case must be considered as though the statute had, in specific terms," so provided, and "as though such meaning had been specifically expressed" therein." *Cudahy Packing Co.* v. *Parramore* (1923), 263 U. S. 418, 68 L. Ed. 366, 44 S. Ct. 153; *Knights of Pythias* v. *Meyer* (1924), 265 U. S. 30, 68 L. Ed. 885, 44 S. Ct. 432; *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.* (1934), 291 U. S. 352, 78 L. Ed. 840, 54 S. Ct. 392. The generality of the statutory language itself is no longer determinative after the highest state court has placed upon it a narrow and specific interpretation. *Leffingwell* v. *Warren* (1862), 67 U. S. (2 Black.) 599, 603, 17 L. Ed. 261, 262.

The sole question here is, not whether the statute may have been given another construction and application, but whether the statute, as here construed and applied, is valid. *Concordia Fire Ins. Co.* v. *Illinois* (1924), 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830; *Prince* v. *Commonwealth* (1944), 321 U. S. 158, 88 L. Ed. 403, 64 S. Ct. 438.

As so construed and applied, the proviso of the law became a special statute which was designed and intended to reopen for a period of one year after July 1, 1941, all claims against appellant and National City Company, only, and as to "this stock," *only*, and to leave the bar of the limitations statute unchanged as to all other corporations and securities, whatsoever their kind or nature. On the Supreme Court's construction, the legislature did all this because it wanted the purchasers of "this stock" to recover from these two particular corporations; it did not like the prior opinion of the state court which denied such recovery; it was determined to change "the law" specifically as to these corporations and in favor of such stockholders. The State Supreme Court said in effect that the clause must be read as though it had provided expressly:

> "* * * but as to the 'combined units' sold in this state prior to the crash in 1929 by Chase Securities Corporation and National City Company, and notwithstanding the decisions of the Supreme Court in the *Pomeroy* and *Donaldson* cases with which the legislature is dissatisfied, an action may be brought by the plaintiffs in said cases and by other purchasers of such stock within one year following the effective date of this section and all actions heretofore adjudicated upon such stock against such purchasers are hereby automatically revived without further act of such purchasers."

Such construction was determinative and vital to the decision, without which the Court could not have concluded

that the legislature should not have used the word "provided," as it did in this statute."[14] It was necessary not to confirm or clarify, but rather to *remake* the purportedly "clear" statutory language in order to reach the result which the court was bent upon reaching.

It is a settled rule of this Court that the equal protection clause of the Fourteenth Amendment requires that the classification of persons or corporations for legislative purposes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287; *Royster Guano Co.* v. *Virginia* (1920), 253 U. S. 412, 64 L. Ed. 989, 40 S. Ct. 560; *Louisville Gas and Electric Co.* v. *Coleman* (1928), 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423.

The construction and application of the 1941 law given by the State Supreme Court violates these fundamental standards. It does not even purport to apply to a classification of corporations of which appellant might be considered a part. It rests upon no fair or reasonable basis whereby appellant and National City Company might be distinguished from hundreds of other securities houses throughout the country who had sold securities in Minnesota during the period "more than five years" before July 1, 1941, the effective date of the law. There is no conceivably logical basis for legislation enacted for the specific purpose of restoring to purchasers of two stocks in Minnesota rights of action which were not restored to purchasers

[14] After the extensive review of these purported "circumstances under which the law was enacted" the Minnesota court concluded, "we look to the intent expressed even if it is in a proviso when it should have been expressed without the use of the word, 'provided'" (R. 406, f. 1822).

of thousands of other stocks in this state during the same period "more than five years" prior to July 1, 1941.

Nor can the law be sustained as a proper classification of corporations foreign to the state of Minnesota, since that distinction has no reasonable basis with relation to the object of the legislation and there is no reasonable presumption that equality would result. *Air-Way Electric Appliance Corp.* v. *Day* (1924), 266 U. S. 71, 69 L. Ed. 169, 45 S. Ct. 12; *Power Mfg. Co.* v. *Saunders* (1926), 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678. Appellant was as much present and subject to suit in Minnesota at all times as a domestic corporation, inasmuch as it had complied with the statute requiring appointment of an agent for service of process when it withdrew from that state in 1931. *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 159, 296 N. W. 513, 515; *Donaldson* v. *Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518. The discrimination is entirely arbitrary, no matter what basis is assumed. *Smith* v. *Cahoon* (1931), 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582; *Borden's Farm Products Co.* v. *Baldwin* (1934), 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187.

The law comes within the well stated prohibition, announced by this Court in *Hartford Steam Boiler Inspection & Insur. Co.* v. *Harrison* (1937), 301 U. S. 459, 81 L. Ed. 1223, 57 S. Ct. 838:

> "Despite the broad range of the States discretion, it has a limit (under the equal protection clause) which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 79 L. Ed. 281, 288, 55 S. Ct. 187. They cannot stand as reasonable if they offend the plain standards of common sense."

It is subject to the same condemnation levelled by this Court, in *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*

(1899), 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565, at a state law granting railway rate privileges to a certain class of persons:

> "It is a pure, bald, and unmixed power of discrimination in favor of a few persons. * * * There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason."

Exhaustive search of the decisions of this Court has not revealed a single case where a state law, being reviewed under this objection, has been given such an arbitrary, discriminatory and unreasonable construction. The foregoing decisions of this Court, stating the scope of equal protection, establish the invalidity of a law so extreme as this one has been construed to be.

4

The judgment of the State Supreme Court violates the due process clause of the Fourteenth Amendment guaranteeing a fair trial, because it is predicated upon a finding of legislative intent made by the court without allowing appellant a trial of that issue or an opportunity to know the factual basis for such finding.

(Specification of Error No. 4)

In construing the proviso clause of the 1941 law, The Minnesota Supreme Court found that the legislature was dissatisfied with the law settled by the prior appeal, that it believed that law "unjust to numerous plaintiffs," and that it had this and similar cases in mind and it intended to revive barred claims against appellant and National City Company and particularly those adjudicated by the 1941 decisions (quoted in first paragraph of Point 3, above).

There is no proof whatsoever in the record to support such a finding of legislative purpose and intent. The only reference to evidence was that appellant had made about 500 sales of Chase units in Minnesota prior to 1929—a fact not even suggestive of the many assumptions made concerning legislative mind. Nor can such finding be read from the plain words of the proviso when it is properly considered with the obvious legislative purpose of the entire section—*to limit* rather than to extend the time for bringing actions for violations of the Blue Sky law.

The court's opinion in effect admits the correctness of the above statement because, in order to avoid the customary purpose of "proviso" clauses (to limit rather than to extend) which it conceded, it found it necessary to resort to a lengthy discussion of numerous and detailed factual assumptions and alleged circumstances (totalling fully 1½ pages of the 9 pages of the opinion as printed in the state reports), plainly drawn from sources outside the record evidence and outside the statutory words themselves. Having done so, it concluded that the words of the proviso (apart from the section as a whole) "*and* ~~and~~ circumstances under which the law was enacted" required the finding of legislative intention "even if it is in a proviso when it should have been expressed without the use of the word 'provided' " (R. 406, f. 1822), and even though such finding resulted in a construction of the proviso contrary to the general rule of statutory constuction provided by statute at the same legislative session; namely, that "provisos should be construed to limit rather than to extend the operation of clauses to which they refer" (Minn. Stat. 1941, Sec. 645.19). That finding was not one to confirm the words of the clause; rather, it was the principal reason given for *remaking* the proviso language to read as though the word "provided" did not exist therein.

The question of legislative intent in this case thereby ceased to be a pure question of law based alone on the words of the statute. The State Supreme Court for the first time made the question one of fact. As such, the fact of legislative intent became an issue concerning which evidence is as admissible as upon any other question of fact. See *Henry Wolf Bikel, "Questions of Fact Affecting Constitutionality,"* 38 Harv. L. Rev. 6; 1 *Wigmore on Evidence* (3d ed.) Sec. 4 (1) pp. 145-46; 9 *Wigmore on Evidence* (3d ed.) Sec. 2555, pp. 521-22; *Nashville, Chattanooga & St. Louis Ry.* v. *Walters* (1934), 294 U. S. 405, 79 L. Ed. 949, 55 S. Ct. 486. Where (as here) the fact question is one of decisive significance, the parties should have the right (which a court should recognize and welcome) to submit all available proof on the issue. Unless such right is given and protected, a fair trial is denied.

When the question was first presented as one of fact by the Supreme Court's opinion, appellant on its Petition for Rehearing challenged the finding as being without any support in the record evidence and contrary to all the available factual proof of legislative intent. It therein made an offer of proof (See Petition for Rehearing, Point II, R. 416-438), consisting of the following:

> The detailed affidavit of the official sponsor of the 1941 law, the Commissioner of Securities, showing that the preliminary draft of the bill containing the identical proviso here in question, except that the period was 2 years in place of 5 years, was submitted to him three weeks prior to the decisions in this and the *Pomeroy* cases on the first appeal (R. 425, 427); and that after those decisions were handed down on January 10, 1941, he did not recall that he, or anyone in his department, or any member of the legislature expressed the desire to lift the bar as to any outlawed suits or the desire or intention to pass a law to reopen barred claims or to

change the law as then decided by the Supreme Court (R. 426; 427).

The detailed affidavits of two members of the judiciary committee of the House of Representatives where the only recorded discussion of the bill occurred, showing that no mention was made of the *Pomeroy* and *Donaldson* cases nor was any intention expressed by anyone to revive barred claims in those cases or Blue Sky cases generally (R. 431-432).

The official Journals of the Minnesota House of Representatives and Senate for the 1941 legislative session and the committee reports, showing, among other things, that in the legislative history of the law there was no affirmative evidence of an intention to revive the barred causes of action in this or the *Pomeroy* case or to revive barred causes of action in Blue Sky cases generally (R. 428-431).

Such offer was accompanied by a request for remand of the case to the trial court for trial of that issue, or a reference for taking of evidence thereon, the appellant contending that otherwise it would be denied a fair trial on the issue, as guaranteed by the due process clause (R. 418, f. 1848—R. 420, f. 1852). Both the offer of proof and the request for remand were denied summarily by the State Supreme Court without opinion, when the entire petition was denied (R. 474, f. 1936).

There are two substantial reasons why, prior to this time, appellant had offered no factual proof of legislative intent, both arising out of the unusual manner in which the 1941 law came into the case and its treatment by the trial court and appellee's counsel: (a) the failure of appellee to sustain her burden of proof of evidence on the issue of legislative intent, as a result of which there was nothing factual in the case on the issue for appellant to controvert by proof; and (b) the denial by the trial court of appellant's motions,

made after passage of the 1941 law; for a new trial on all issues. The procedural history of the case shows appellant never waived its right to submit the proof which it offered at its first opportunity.

On the first reason, the record shows that the main trial of the action occurred in May, 1939, almost two years prior to the passage of the 1941 law. On her motion for amended findings of fact or a new trial made after the law was enacted, appellee did not ask for leave to offer evidence on the intent of the legislature in enacting that law (R. 285-286), but requested the proposed finding as to the applicability of the law (R. 285) as a pure question of law to be determined by the words of the law itself. Neither did appellee contend in the trial court or upon appeal to the State Supreme Court for a finding of intent based upon matters apart from the statutory language, on the theory of judicial notice or otherwise. All the while and as a matter of basic trial procedure, she had the burden of proving the affirmative of what the Supreme Court later found by resort to outside facts. And that burden was especially upon her because, in effect, she contended for a result which would run counter (as the Supreme Court decision frankly admits) to the presumption existing in appellant's favor by virtue of the provision of the general construction statute, saying that "provisos should be construed to limit rather than to extend the operation of clauses to which they refer" (Minn. Stat. 1941, Sec. 645.19).[15] Appellee having failed to

[15] The situation is analogous to that where the meaning of words of a contract is called in question. In such situation, the party claiming that the words used differ from the ordinary and accepted meaning has the burden of proving such claim. *DeWitt* v. *Berry* (1890), 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896, 900; *Tampa Shipbuilding & E. Co.* v. *General Constr. Co.* (C. C. A. 5th 1930), 48 F. (2d) 309, 85 A. L. R. 1178, 1184; *Sunseri* v. *Garcia & M. Co.* (1929), 298 Pa. 249, 148 Atl. 81, 67 A. L. R. 1428, 1430.

submit the factual proof in the trial court which the Supreme Court later deemed material and decisive, there was nothing factual on the issue for appellant to controvert at any time during trial of the case.

On the second reason, appellant, notwithstanding the lack of procedural burden on its part to submit proof on the issue to the trial court, took all available steps to call the absence of evidence on the question to the trial court's attention. Thus, the trial court in June, 1942, made a brief, vague, and indefinite finding that "insofar as" the provisions of the 1941 law "are applicable to plaintiff's cause of action" the time for assertion thereof was extended (Par. XXXII (third paragraph), R. 313-314, f. 1157) but failed to make any specific finding of legislative intent as to the law. Promptly, appellant made its motion for amended findings or a new trial on the ground, among others, that the trial court's application of the 1941 law was not supported by the evidence in the record (Par. No. 13 of Motion, R. 338). This motion was denied in November, 1942 (R. 351) and the ruling was assigned as error on the appeal (Par. No. 31, R. 384-386, ff. 1794-1796). There was nothing more which appellant could have done. It fulfilled every procedural requirement, technically and as a practical matter. Appellant's offer of proof, made promptly after the State Supreme Court's reliance upon factual aspects of the issue, was timely and seasonably made under all the circumstances of this case.

Furthermore, inasmuch as such basis of decision for the above reasons could not have been reasonably anticipated by appellant prior to the Supreme Court's opinion, it is entitled to the protection, also, of a rule of this Court which has allowed a review of federal questions raised for the first time on a state court petition for rehearing, where it could "not reasonably be held that the company was bound to anticipate such a construction." *Missouri ex*

rel. Missouri Ins. Co. v. *Gehner* (1930), 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326; and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

The offer of evidence made by appellant at its first real opportunity was proper. In numerous cases, this Court has fully examined and relied upon statements from individual members of Congress (both proponents and opponents of bills), deliberations and reports of legislative committees, and debates, to determine the legislative intent and purpose of an act. See, for example, *Helvering* v. *Griffiths* (1943), 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636; *United States* v. *Wrightwood Dairy Co.* (1942), 315 U. S. 110, 86 L. Ed. 726, 62 S. Ct. 523; *United States* v. *Dickerson* (1940), 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034; *United States* v. *Dotterweich* (1943), 320 U. S. 277, 88 L. Ed. 74, 64 S. Ct. 134, and an extensive collection of decisions of this Court and State Courts to the same effect in 70 A. L. R. 5. The same rule prevailed in Minnesota at the time this case was before the State Supreme Court, *Barlau* v. *Minneapolis-Moline Power Co.* (1943), 214 Minn. 564, 9 N. W. (2) 6.

The matters of the kind here offered by appellant as proof were the most competent proof available on the question. If such kind of proof is inadmissible, then no proof is admissible. Legislative intent would indeed be a fiction, subject entirely to the whim and caprice of the Court and incapable of any factual contradiction—no matter how erroneous (as here) the judicial assumption might be and how compelling the true facts to the contrary would appear. This is not and should not be the law of this Court.

The only seeming basis for the State Court's finding on the issue is that the matters found were the proper subject of "judicial notice." Appellant submits that such matters

were not of that character. But even if they were, it is the well settled law of this Court that due process guarantees to the opponent the right to a trial, wherein he may be advised of the facts of which the Court is about to take judicial notice and wherein he may show facts and circumstances contradictory to the matters to be judicially noticed. This rule is squarely accepted in *Ohio Bell Telephone Co.* v. *Public Utilities Commission* (1937), 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. The Ohio Public Utilities Commission and the State Supreme Court in a rate case refused to permit the defendant telephone company to be heard and to submit evidence contradictory to certain price trends which had been judicially noticed, on the ground that such matters could not be controverted. On appeal, this Court held that the defendant company had been denied a fair hearing, in violation of the due process clause. The opinion said in part:

> "Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.
>
> "An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice.
>
> . . . . . .
>
> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, §2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'
>
> . . . . . .

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.

. . . . . .

"What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"

The rule of this case had been recognized previously in 5 *Wigmore on Evidence* (2d Ed.), Sec. 2567, p. 570. It has been reaffirmed in 9 *Wigmore on Evidence* (3rd Ed.) Sec. 2567, p. 535.

Other expressions of this Court are to the same effect. In *Borden's Farm Products Co.* v. *Baldwin* (1934), 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187, this Court observed that the "sphere of judicial notice" has definite limitations and that the constitutionality of legislative action should not be determined without the taking and considering of all available evidence on the question. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, and *Nashville, Chattanooga & St. Louis Ry.* v. *Walters, supra,* it was held that the due process clause requires a State Court (a) to afford a party the opportunity to present its case and to be heard in its support, and (b) to consider all of such evidence before deciding the validity of a state law.

Here, both constitutional rights of appellant: (a) the right to know the particular facts judicially noticed, and (b) the right to dispute such purported facts by evidence, have been violated. The State Supreme Court never stated

the source of such matters seemingly noticed. Appellant does not yet know the basis for the assumptions as to legislative mind and intent. Nor has it had the opportunity to submit the readily available and competent proof which we consider to be strongly contrary to those assumptions.

The State Court's abrupt disposition of the issue without trial is wholly without legal precedent and is devoid of the most elementary principles of justice. A substantial right guaranteed appellant by the due process clause has been violated.

Conclusions

Appellant respectfully submits that the judgment appealed from should be reversed for any one or all of these reasons:

1. It construes and applies the 1941 law so as to abrogate a prior final judgment in appellant's favor in this same case, and thereby deprives appellant of its property without due process of law.

2. It construes and applies the 1941 law so as to revive a cause of action for breach of a statute, barred by a limitations statute which limited the right of recovery, and thereby deprives appellant of its property without due process of law.

3. It construes and applies the 1941 law against appellant so as to make it an unreasonable and arbitrary law, and thereby denies appellant the equal protection of the laws.

4. It is predicated upon a finding of legislative intent concerning the 1941 law as to which appellant had no opportunity for trial or to know the factual basis for such finding, thereby depriving appellant of a fair trial and of due process of law.

In so reversing, this Court will protect not only appellant but future litigants against unconstitutional legislative action which would abrogate a final judgment of the state in favor of a litigant, or which would revive "ancient claims" (statutory or common law) which had become barred years before, or which would be applied only to an arbitrary and special class of persons. And appellant and all litigants will thereby be protected, also, against judicial action which would deny fair trial upon matters considered to be within the "sphere of judicial notice."

Dated: December 5, 1944.

Respectfully submitted,

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